Office-Supreme Court, U.S.
FILED
SEP 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-2130

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

---

JULIE FISHER

Petitioner,

vs.

YVONNE LARSEN, W. DANIEL LARSEN, JOSEPH HARMON, EDWIN GRAY, MICHAEL SCOTT-BLAIR, and THE COPLEY PRESS INC.

Respondents

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL, STATE OF CALIFORNIA,
FOURTH APPELLATE DISTRICT

---

# PETITIONER'S REPLY BRIEF

Julie Fisher
3726 Charles Street,
San Diego,
California 92106
619 - 223-6623
Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

REPLY TO RESPONDENTS' ARGUMENTS IN OPPOSITION TO THE FIRST QUESTION PRESENTED FOR REVIEW.....1

REPLY TO RESPONDENTS' ARGUMENTS IN OPPOSITION TO THE SECOND QUESTION PRESENTED FOR REVIEW.....7

REPLY TO RESPONDENTS' ARGUMENTS IN OPPOSITION TO THE THIRD QUESTION PRESENTED FOR REVIEW.....8

TABLE OF AUTHORITIES

Gilman v. McClatchy
111 Cal 612, 1896.....6

Herbert v. Lando
441 U.S. 169, 155.....1,2,8

Lewis v. Time
No. 82-4026, U.S. Court of
Appeals, Ninth Circuit,
July 12, 1983.....3

Maidman v. Jewish Publications
54 C. 2d, 649,651,652,653.....5

Ollman v. Evans
No. 79-2265, U.S. Court of
Appeals, District of Columbia
Circuit, Aug. 5, 1983.....3

Zacchini v. Scripps-Howard
433 U.S. 568, 1976.....6,7

## FIRST QUESTION PRESENTED FOR REVIEW

The first question presented for review is whether the First and Fourteenth Amendments require that states abandon their common law to extend greater protection to media defendants than that guaranteed by the actual malice rule; specifically, whether media defendants in public person defamation actions must be given absolute immunity for defamatory statements of opinion or for republished, newsworthy, libelous statements published with actual malice.

This question is closely akin to that considered by this Court in Herbert v. Lando.

> "The question here is whether those amendments should be construed to provide further protection for the press when sued for defamation than has hitherto been recognized."
>
> "It is...urged by respondents that the balance struck in New York Times should now be modified to provide further protections for the press when sued for circulating erroneous information damaging to individual reputation." (Herbert

v. Lando, 441 U.S. 169, 155)

The gist of respondents' argument is that this Court need not consider this question because the disputed privileges were firmly established by the New York Times decision and its progeny. They argue that it is petitioner who seeks to have this Court change its interpretation on the opinion and republication issues.

> "Petitioner...is in essence urging this Court in the first Question Presented to abandon the New York Times v. Sullivan and Gertz rules long established by this Court and apply a negligence standard to reporting of political debate."
>
> "Petitioner FISHER's position that opinions are actionable is without merit and does not justify review by this court." (Respondent's Brief in Opposition, pages 6,7)

As was the case in Lando, it is respondents who are advocating modification of the balance struck by New York Times. They have considerable support. Courts in many jurisdictions have recognized some version of one or both of these privileges - solely on federal grounds.

This is exemplified by two decisions issued since this case was placed on the Court's docket.

> The constitutional privilege for expressions of opinion was identified in Gertz v. Robert Welch.."
>
> "We deal with a privilege that derives from the Constitution not from state law." (Lewis v. Time U.S. Court of Appeals, Ninth Circuit, No. 82-4026, July 12, 1983)
>
> "Gertz' pronouncement that the First Amendment confers an absolute privilege on expressions of opinion stands as one of the cardinal principles of free speech and press. Yet, as my brief review of pertinent Supreme Court defamation cases illustrates, it is a principle on whose implementation the Court has been virtually silent." (Ollman v. Evans, U.S. Court of Appeals, District of Columbia Circuit, No. 79-2265, Aug. 5, 1983)

Consideration of this question is particularly important in this case. Demurrers to four causes of action were sustained because of this erroneous interpretation of the Gertz decision; it was the sole authority for recognition of an absolute privilege. The demurrers would not have been sustained

under pre-Gertz California law because it recognized only a qualified privilege for statements of opinion and petitioner had adequate evidence of malice to defeat the privilege.

There is no reason to conclude that the Times decision required a change in California law as it pertained to statements of opinion. California was one of the 'minority' states that had adopted a qualified privilege for libelous statements of fact prior to the New York Times decision. Its fair comment privilege reflected this difference from the 'majority' states. A defendant did not have to show the truth of facts upon which an opinion was based in order to qualify for the fair comment privilege. To defeat the privilege the plaintiff was required to prove that the defamatory comments were published primarily because of hatred and ill-will rather than because of a desire to enlighten the public.

"Comments, opinions and criticisms may be defamatory even though based upon true or privileged statements of fact. The publisher is liable unless the comments themselves are privileged."

"Statements of opinion, although of a defamatory nature, are privileged in California..."

"Defendants could legitimately comment upon and criticize.... even though the criticism adversely affected...reputation." "But this defense of fair comment is not absolute. There is no absolute right to destroy a person's name and reputation by publication of defamtory criticisms and opinions .... The protection which the law affords to those who would comment or criticize extends only to comment which is 'fair', not in the sense that it must be reasonable or moderate, but in the sense that it must be published, in part at least, for the bona fide purpose of giving the public the benefit of comment which it is entitled to have, rather than for any ulterior motive of causing harm to the plaintiff." "Allegations that the comments were not published primarily for a bona fide purpose, but were published <u>because of malice</u>, renders the publisher liable if his comments, opinions or criticisms are defamatory." (<u>Maidman v. Jewish Publications</u> 54 C.2d, 649,651,652,653, 1960)

Pre-Times California law was equally clear on the republication issue.

> "It may have been a true report of what these women told the reporter, but that is not the truth which will justify a publisher. If A says B is a thief, and C publishes the statement that A said B was a thief, in a certain sense this would be the truth, but not in the sense that the law means. It would constitute no defense to C, for it would be but a repetition by him of a slanderous charge." (Gilman v. McClatchy 111 Cal. 612, 1896)

In this case the Court of Appeal recognized a privilege which absolutely immunizes the press from liability for republication of libels, again, solely on federal grounds. It is in direct opposition to long established California law.

Under these circumstances the Court should decide the federal issue.

> "It appears to us that the decision rested solely on federal grounds....In this event, we have jurisdiction and should decide the federal issue; for if the state court erred in its understanding of our cases and of the First and Fourteenth Amendments, we should

> so declare." (Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 568, 1976)

**SECOND QUESTION PRESENTED FOR REVIEW**

The second question presented for review is whether the First and Fourteenth Amendments prohibit states from extending absolute immunity to press defendants in public person defamation actions where actual malice is shown.

Respondents argument against consideration of this question is,

> "Petitioner FISHER's second Question Presented is not supported by the record or the decision below." (Respondent's Brief in Opposition, page 7)

It is true that the Court of Appeal affirmed the orders granting summary judgments and sustaining demurrers purely on federal grounds.

Petitioner hasn't found any authority explicitly recognizing a positive First Amendment interest in reputation. However, the factual record of this case illustrates

how erroneous it is to assume that First Amendment interests always favor defendants in public person defamation actions, and this Court has stated that it is not improper to seek a new constitutional interpretation.

> "It is not uncommon or improper... to suggest the abandonment, modification or refinement of existing constitutional interpretation.." (Herbert v. Lando, 441 U.S. 169)

**THIRD QUESTION PRESENTED FOR REVIEW**

The third question presented for review is whether section 48a of California's Civil Code is unconstitutional.

Respondents' argument against consideration of this question is that there were other grounds upon which the summary judgments could have been sustained.

> "Petitioner Fisher's third Question Presented requests this Court to invalidate a State statute, California Civil Code 48a, without any support in the record for such drastic action by this Court or reasoned basis requiring Supreme Cour review. It is well-settled that this Court will not pass

> on the constitutionality of an act of the State legislature where other grounds are available for disposition of the issues of the case. FISHER admits that the New York Times v. Sullivan rule requires her to show actual malice. Thus, it is unnecessary for this Court to even address the constitutionality of California Civil Code 48a." (Respondent's Brief in Opposition, pages 7,8)

The implication is that FISHER lacked sufficient evidence of actual malice to withstand respondents' motions for summary judgment. This is contrary to the assessment of the Appellate Court.

> "The fourth and fifth causes of action challenge similar allegations made in separate news articles, reasonably subject to interpretation as factual reports of Fisher's endorsement of illegal teachers' strikes. However, because Fisher never formally demanded retraction of these articles she only seeks to recover the 'special' damages limited to loss of the future benefits of her lost elective office. Since we hold these damages are not recoverable, summary judgments on the fourth and fifth causes of action were proper."(138 Cal.App.3d 643)

In its discussion of another cause of

action, which was based on publication of a similar statement, the Appellate Court cited evidence of actual malice sufficient to reverse summary judgment.

> "Scott-Blair...continuously followed Fisher's campaign from before the June 1977 strike, and knew he earlier falsely reported Fisher had actually marched with the teachers during their illegal strike and knew Fisher publicly denied favoring teachers' strikes (See San Diego Union editorial, 10/17/77, "Uplavici Syndrome Strikes Again..."(138 Cal.App.3d 644)

There is no indication that Fisher had insufficient proof of actual malice.

Dated: September 17, 1983

Respectfully submitted,

Julie Fisher

JULIE FISHER,
Petitioner